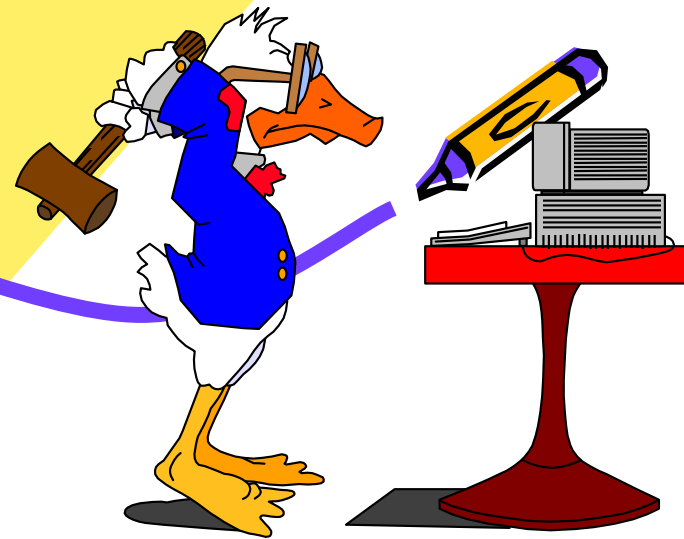


LIABILITY FOR LOSS, DAMAGE or DESTRUCTION OF GOVERNMENT PROPERTY

Presented by
Dr. Douglas N. Goetz, CPPM, CF
Professor of Contract Management
Defense Acquisition University
MidWest Campus, OH



- Liability for Loss, Damage and Destruction of Government Property in the possession of the contractor takes MANY different forms.
- This presentation will explore:
 - Loss of "Pure" Government Property
 - Loss of Progress Payments Inventory
 - Loss of Right to Title Special Tooling
 - Loss of Delivered End Items



GOVERNMENT'S OVERARCHING POLICY

- FAR 45.103

- Contractors are responsible and liable for Government Property in their possession unless otherwise provided by the terms of the contract.



LIABILITY FOR L, D, & D

(FAR 45.103(b))



- **Generally**, Government contracts do **NOT** hold contractors liable for loss, or damage to Government property when the property is provided under:
 - **FIXED PRICE NEGOTIATED** (52.245-2 ALT I) When price is not based upon:
 - Adequate price competition
 - Established catalog or market price or prices set by law
 - **COST REIMBURSEMENT** (52.245-5G)
 - **FACILITIES CONTRACTS** (52.245-8) or
 - Negotiated or sealed bid **SERVICE** contracts performed on a military installation where the contractor has little direct control over the property



LIABILITY FOR L,D & D



- **TWO FORMS:**

- **FULL RISK OF LOSS PROVISIONS**

- 52.245-2(g)

- **LIMITED RISK OF LOSS PROVISIONS**

- 52.245-2 ALT I;
 - 52.245-5G;
 - 52.245-8



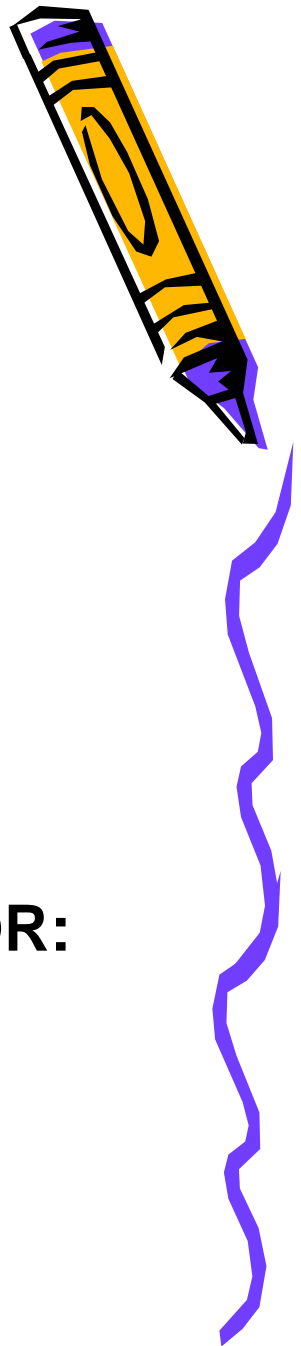
LIABILITY FOR L, D & D

- FIXED PRICE COMPETITIVE
 - (52.245-2 REGULAR G)
 - **CONTRACTOR IS LIABLE** FOR

“**ANY**”

LOSS, DAMAGE, OR DESTRUCTION EXCEPT FOR:

- REASONABLE WEAR AND TEAR OR
- REASONABLE AND PROPER CONSUMPTION



LIABILITY FOR L, D, & D

- **SCENARIO:**
 - CONTRACTOR HAS 1 ITEM OF ST
 - ACQUISITION COST - \$200
 - AGE - 10 Years Old
- **CONTRACTOR LOSES THE ST**
- **TWO QUESTIONS:**
 - IS THE CONTRACTOR LIABLE?
 - FOR HOW MUCH IS THE CONTRACTOR LIABLE?



LIABILITY FOR L, D, & D

- **QUANTUM**

- **ACQUISITION COST**
- **APPRECIATED COST**
- **DEPRECIATED COST**
- **SCRAP VALUE**
- **REPLACEMENT COST**



LIABILITY FOR L, D, & D

- **QUANTUM** was Determined by a Court Case

- Dynalectron Corporation vs. U.S.

- ASBCA No 29,831;

85-3 BCA Para 18,320



LIABILITY FOR L, D, & D

- The Court used the term

“Intrinsic Value”

- The amount of the loss may range from
 - **Scrap** value for LOST GP where the Government **has no need**
 - **Salvage** value for DAMAGED GP where the Government **has no need**
 - **Repair** cost where the G **has need** of damaged stuff
 - **Replacement** cost where the G **has need** -- either current or probable future



Valuation of Lost, Damaged or Destroyed Government Property for Liability Purposes

“INTRINSIC VALUE”

GP is Lost or destroyed.
Government has NO
current or probable
Future need.

LIABILITY VALUATION:

SCRAP VALUE

GP is Lost or destroyed.
Government still has a
current or probable
Future need.

LIABILITY VALUATION:

REPLACEMENT

GP is damaged.
Government has NO
current or probable
Future need.

LIABILITY VALUATION:

SALVAGE

GP is damaged.
Government still has a
current or probable
Future need.

LIABILITY VALUATION:

REPAIR



LIABILITY FOR L, D, & D

- **LIMITED RISK OF LOSS**

- Fixed Price Negotiated

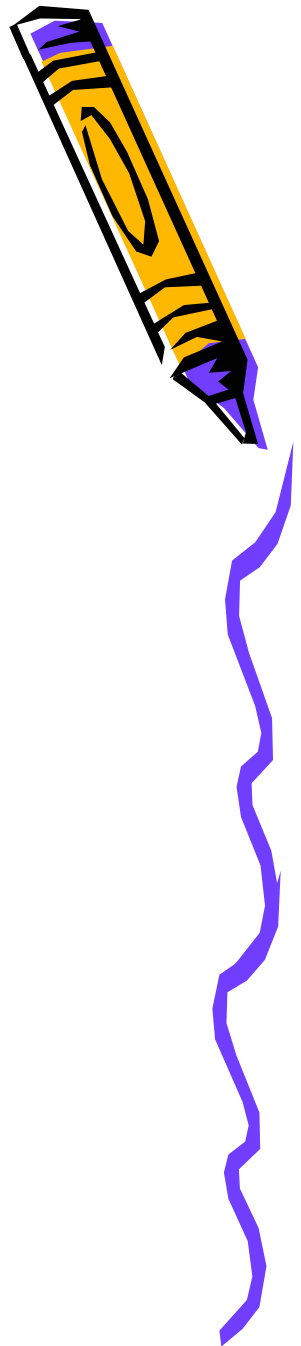
- (52.245-2 ALT I)

- Cost Reimbursement

- (52.245-5(g))

- Facilities Contracts

- (52.245-8)



LIMITED RISK OF LOSS

- The contractor shall

NOT

be liable for loss or
destruction of or damage to
the Government property
EXCEPT...



LIMITED RISK OF LOSS

- The contractor **SHALL** be responsible for:
 - 1. Risk **expressly** required to be **insured**
 - 2. Risk, that is **IN FACT** INSURED
 - 3. Contractor otherwise responsible under express terms of contract...



LIABILITY FOR L, D, & D

- Contractor shall be responsible for
 - 4. **Willful Misconduct**, **Lack of Good Faith** on the part of **Contractor's Managerial Personnel**

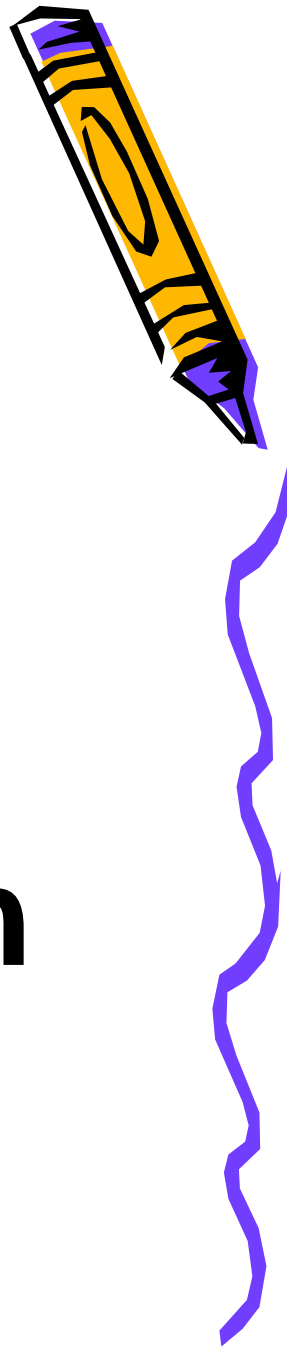


LIABILITY FOR L, D, & D

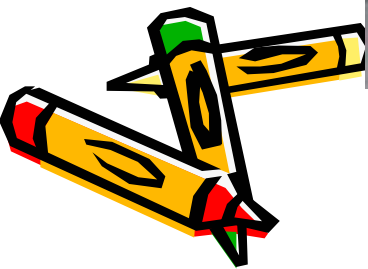
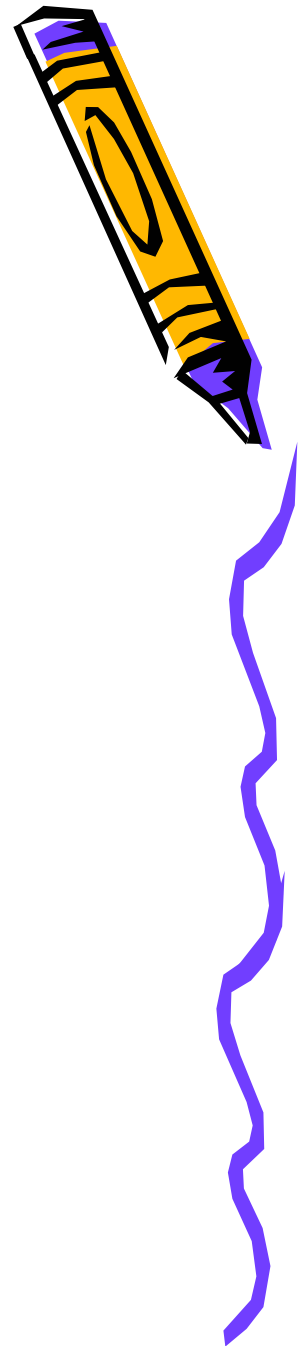
- **DEFINE:**

- **Willful Misconduct**

- **Lack of Good Faith**



The Saga of the Drunken Fork Lift Operator

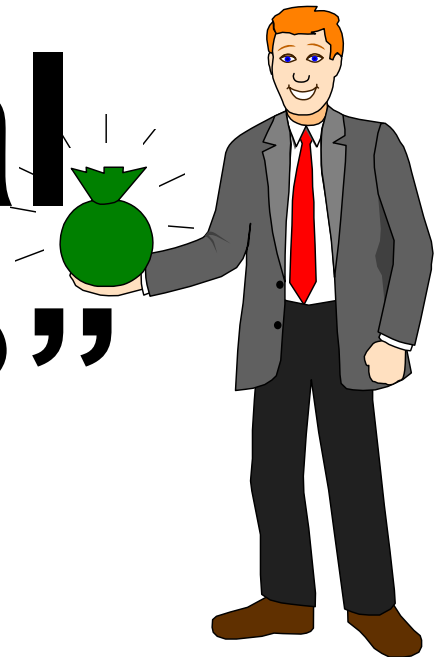


LIABILITY FOR L, D, & D

- **DEFINE**

**“Managerial
Personnel?”**

I'm the
Prez!



LIABILITY FOR L, D, & D

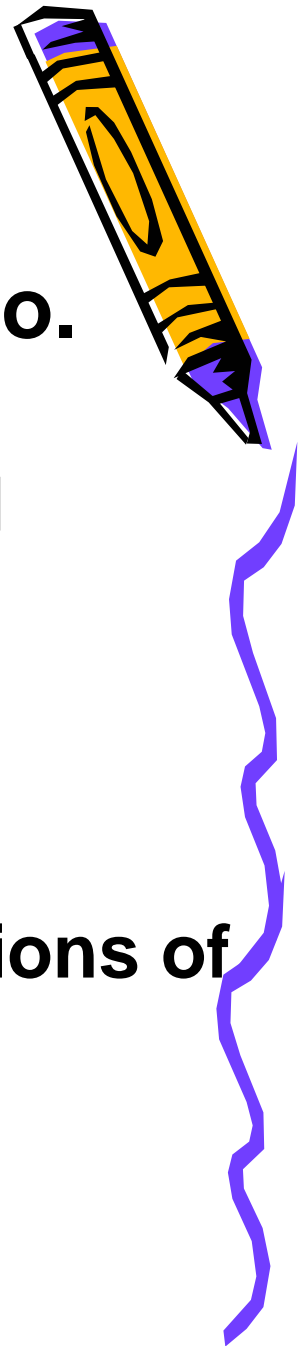


- As used in this paragraph (g) means the Contractor's, Directors, Officers, and any of the contractor's managers, superintendents, or equivalent reps who have supervision or direction of--
 - **ALL OR SUBSTANTIALLY ALL** of the contractor's business
 - **ALL OR SUBSTANTIALLY ALL** of the contractor's operation at any one plant or a separate and complete major industrial operation connected with performing the contract



LIABILITY FOR L, D, & D

- **Fairchild Hiller Corporation ASBCA No. 14387 (1971)**
 - **Contract for the Stripping, Washing, and Cleaning of C-130 Aircraft**
 - **The burning of aircraft No. 1**
 - **The burning of aircraft No. 2**
 - **Methylethyl-ketone & Naptha Based Solution**
 - **The court was concerned with the actions of the Kr's Mgr. Pers. Not its lower level employees!**



LIABILITY FOR L, D, & D

- BACK TO 52.245-2(g)(3)(v)
 - **5. Failure, on the part of Kr. Managerial Personnel to Establish and Maintain a Property Control System.**



LIABILITY FOR L, D, & D

- Government has **CONCLUSIVE** proof of willful misconduct - lack of good faith on the part of Kr's Mgr Personnel if PCS has been **DISAPPROVED, WITHDRAWN OR NON-ACCEPTED** by the **ACO** by **Certified Mail** addressed and sent to **CONTRACTOR'S MANAGERIAL PERSONNEL**



LIABILITY FOR L, D, & D

- Contractor may be granted relief if clear and convincing evidence is presented that shows:
 - Loss occurred while approved system was in effect
 - Loss did not occur as a result of PCS status (NEXUS)
 - **NOTE: The burden of proof rests with the contractor**



WHY?

- **Why does the Government have this policy?**
- **It is an economically advantageous methodology to have the Government act as a Self Insurer. So long as the Contractor is a “Good Insurance Risk.” (In other words, maintains an approved Property Control System!)**



CONTRACTOR **RESPONSIBILITIES**

- **Contractor shall report:**
 - In accordance with the Government Property Clause and
 - In accordance with FAR 45.504
 - **Description of data to be reported:**
 - The appropriate Government Property Clause or
 - The PA may request the data as specified in DoD 4161.2-M
- Please NOTE: FAR 45.502(b)



PROPERTY ADMINISTRATOR'S RESPONSIBILITIES

- **Investigation**

- Must reach a valid and supportable conclusion!

- Interface with other Government representatives (where appropriate)
 - See DoD 4161.2-M Chapter 2, Page 2-8

- **Corrective actions**

- where necessary to Property Control System



PROPERTY ADMINISTRATOR'S RESPONSIBILITIES

- **ESTABLISH CASE FILE**
 - **SEE DOD 4161.2-M**
 - **LOG or Register of all LD&D Events**
 - **Copy of Contractor's Report**
 - **PA's Investigative Report**
 - **Final Resolution**



PROPERTY ADMINISTRATOR'S RESPONSIBILITIES

- **RELIEF OF RESPONSIBILITY**

- PA has the AUTHORITY to Grant “Relief of Responsibility,” where appropriate

- **HOLD LIABLE???**

- PA may Recommend to ACO the “**Holding**” of a Contractor Liable (where appropriate)

- PA **DOES NOT** have the authority to HOLD the contractor Liable



CONTRACTING OFFICER'S RESPONSIBILITIES

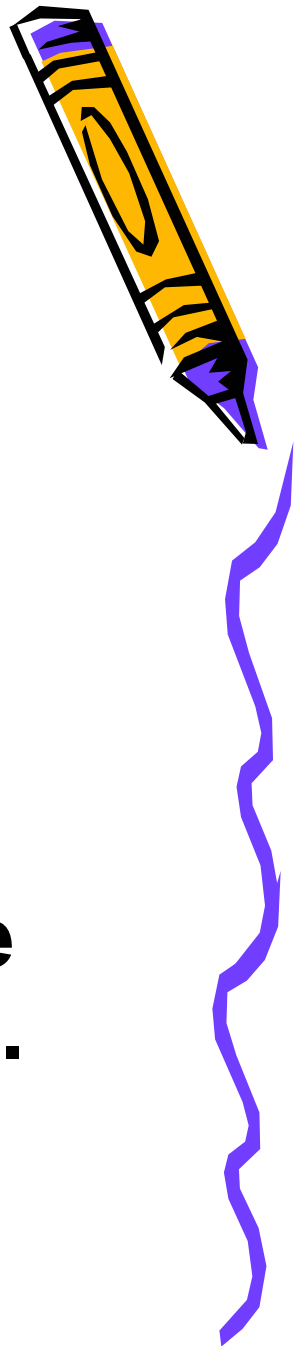


- Issue final liability determination **where contractor is held liable**
- ACO may **withhold funds**, where necessary
- ACO may **request corrective action** for contractor's property control system



COMPARISON OF:

- **Fixed Price Noncompetitive 52.245-2 ALT I**
- **Cost Reimbursement 52.245-5**
- **Facilities 52.245-8**
- **All these clauses read identically!
With one small difference for the
Liability for Facilities Clause. There
is an added provision for insurance.**



OTHER LIABILITY CONCERNS

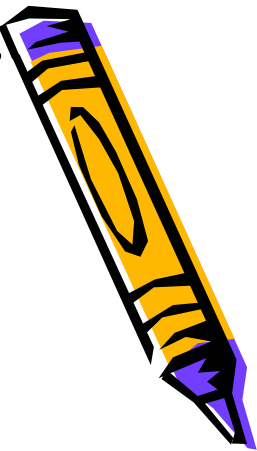
- **Loss of Progress Payments Inventory**
- **Loss of Right to Title Special Tooling**
- **Loss of Delivered End Item Prior to Shipment**
- **Destruction of Government Vegetation and a bunch more!**



Progress Payments Inventory

FAR 52.232-16

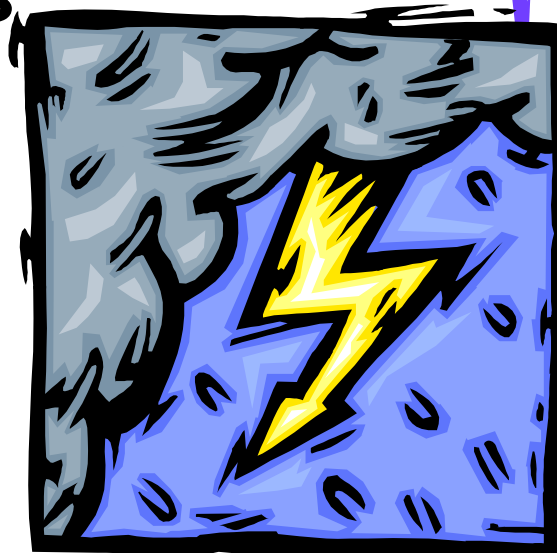
(e) *Risk of loss.* Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.



Progress Payments Inventory

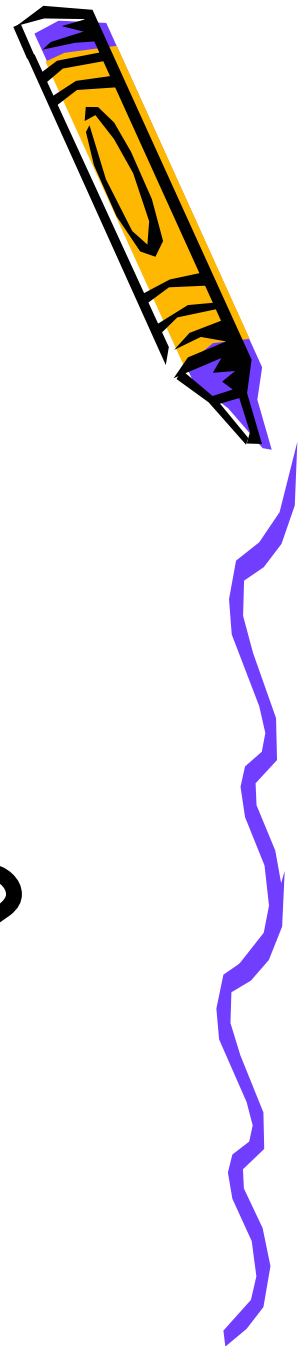
FAR 52.232-16

- Does the Government have to prove Willful Misconduct, Lack of Good Faith on the Part of Managerial Personnel?
- NO - The contractor bears **ABSOLUTE LIABILITY!**



Progress Payments Inventory

FAR 52.232-16



- For How Much?
- Up the amount of
**UNLIQUIDATED
PROGRESS PAYMENTS?**



RIGHT TO TITLE SPECIAL TOOLING

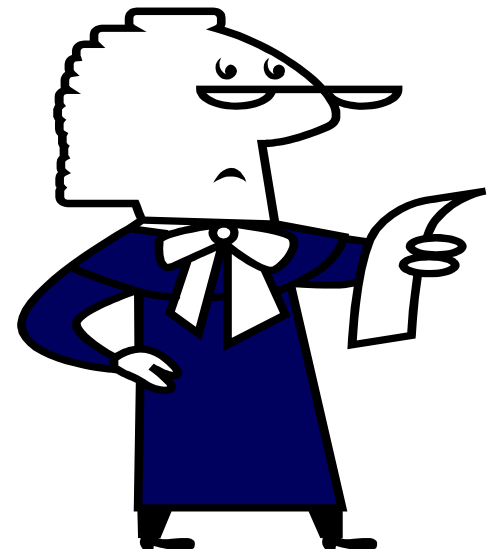
- So, is the contractor liable if they Lose, Damage or Destroy Right to Title Special Tooling under the Special Tooling Clause?
- 52.245-17



RIGHT TO TITLE SPECIAL TOOLING



- THERE IS NO DISCUSSION OF LIABILITY UNDER THE ST CLAUSE (52.245-17).
- Therefore, the contractor bears NO risk of loss - ???
- Is this correct???



RIGHT TO TITLE SPECIAL TOOLING

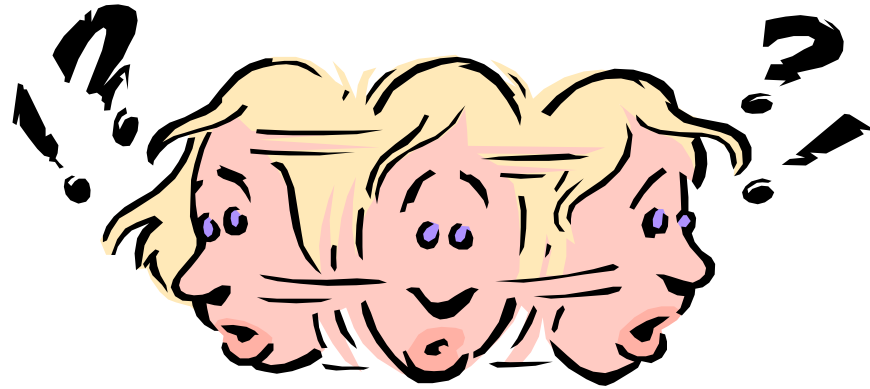
- Check out these EXCERPTS from the Progress Payments clause...
- (d) *Title*.
 - (2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices.
 - (ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this contract;



RIGHT TO TITLE SPECIAL TOOLING



- Therefore, loss, damage and destruction of RTTST is handled under the Progress Payments Clause!
- EXCEPT....
- What if there is NO Progress Payments Clause??? WHAT THEN???



DELIVERED END ITEMS

- What happens if the contractor produces an End Item, it is inspected and accepted by the Government - it is at the contractor's lack of performance, but has not yet been delivered AND IT IS DESTROYED OR LOST OR DAMAGED???



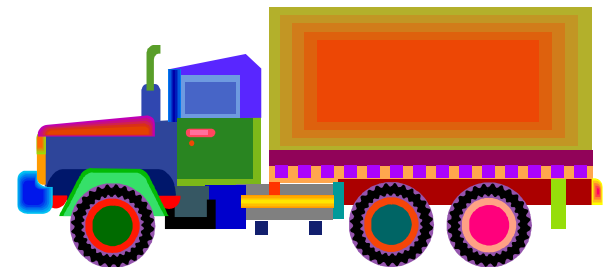
DELIVERED END ITEMS

- Litton Systems, Inc./Guidance & Control Systems Division
- ASBCA 29672, August 1987
- 1 Test Unit - \$427,692



DELIVERED END ITEMS

- Since they're Government Property the Government assumes the risk of Loss - Right?
- Check out the FOB Clauses...
 - 52.247-29 - F.o.b. - Origin.
 - 52.247-30 - F.o.b. - Origin, Contractors Facility.
 - 52.247-34 - F.o.b. - Destination.
 - 52.247-35 - F.o.b. - Destination, Within Consignees Premises.
 - 52.247-37 - F.o.b. -- Vessel, Port of Shipment.
 - PLUS LOTS OF "Variations!!!"



DELIVERED END ITEMS

- (b) The Contractor shall --
 - (4) Be responsible for any loss of and/or damage to the goods --
 - (i) Occurring before delivery to the carrier;



DELIVERED END ITEMS

- “Wait a minute! I did my job. You got your product. Why am I liable?”
- READ THE CONTRACT!!!
- Contractors - don't be so quick to “ship in place” without CLEAR LANGUAGE as to WHO bears the risk of loss for accepted but not yet delivered END ITEMS!!!

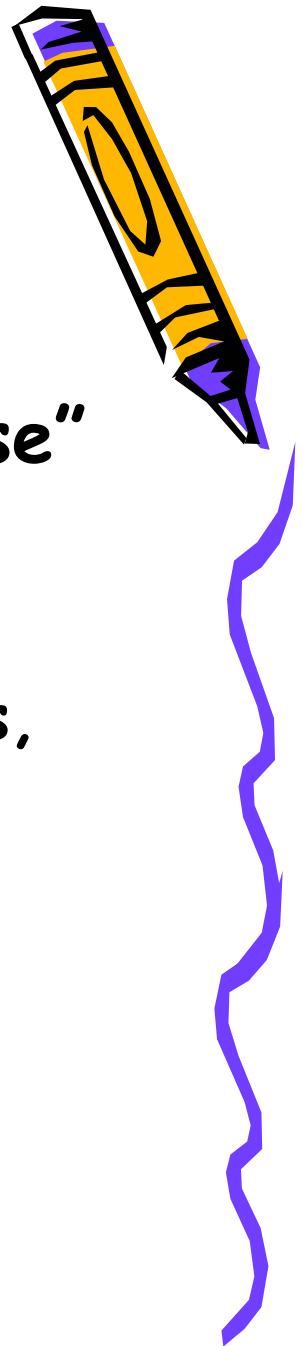


So - Ya' think liability is EASY???

- It's not!!!
- Not because of the FAR Regulations, but because of LAW and COMMERCIAL PRACTICE.
 - Things Like the UCC
 - Things like the COMMON Law of Bailment
 - Things Like the INSURANCE Industry
 - And things like Accidents!!!



SOME FUTURE PONDERINGS



- ✓ Out the "Ground and Flight Risk Clause" in the DFARS
 - 252.228-7001 (Bonds & Insurance)
- ✓ Out the "Protection of Government Buildings, Equipment, and Vegetation."
 - 52.237-2 (Service Contracting Provision)
- ✓ Out the "Limitation of Liability."
 - ✓ 52.246.23 (Quality Assurance Provision)



Closing Thoughts

- The Government Property Regulations are finely woven into the fabric of Government acquisition and contracting. Those of you who desire to “fix” them must tread with great care that the tapestry remains intact and does not turn into a moth eaten fabric with no use nor purpose - where we lose the value that it adds and that we bring to the Government and Industry alike!

Douglas N. Goetz

